



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Metric Constructors, Inc.; H.B. Zachry Company

File: B-229947; B-229947.2

Date: March 25, 1988

DIGEST

1. Contracting officer's decision to cancel invitation for bids based on unreasonableness of bid prices was proper where low bid exceeded government estimate by more than 10 percent and there is not an allegation that decision to cancel was based on bad faith or fraud on the part of contracting officials. The General Accounting Office has upheld rejection of bids where the lowest eligible bid exceeded the government estimate by as little as 7.2 percent.
2. Cancellation of invitation for bids is not legally objectionable where agency determines after bid opening that sufficient funds were not available to make award to the low responsive bidder.
3. Cancellation of invitation for bids (IFB) after bid opening does not result in impermissible auction, even though protester's bid prices have been disclosed and acquisition is to be completed through negotiation, where IFB was canceled due to unreasonable bid prices.

DECISION

Metric Constructors, Inc. and H.B. Zachry Company protest the cancellation after bid opening of invitation for bids (IFB) No. N62467-86-B-0288, issued by the Department of the Navy for the construction of a ship support complex berthing pier and wharf, and for site development and utilities for the Naval Station, Ingleside, Texas. In addition, Metric and Zachry protest the subsequent conversion of this IFB to a negotiated solicitation.

The protests are denied.

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The IFB was issued on October 9, 1987 and six firms submitted bids by bid opening on December 15. Metric's bid of \$51,280,082 was the apparent low bid and Zachry's bid of \$63,947,000 was sixth low and the highest priced bid. Both the government estimate of this project, \$45,640,000, and the available funds, referred to as the "control amount," \$50,309,000, were revealed at bid opening. The contracting officer subsequently determined that the bids received were at unreasonable prices and he decided to cancel the IFB. The Navy informed all bidders of the cancellation and advised that the agency would complete the acquisition through negotiation with them. On January 6, 1988, Metric filed a protest with our Office against the cancellation of the IFB and requested that it be awarded the contract as the low bidder under the IFB. On January 14, Zachry also filed a protest with our Office against the cancellation of the IFB and requested that the contract be awarded to the lowest responsible bidder under the IFB, or if we upheld the propriety of the cancellation of the IFB, that the acquisition be completed by resolicitation for sealed bids. Essentially, Metric and Zachry both contend that the Navy acted improperly in rejecting their bids and canceling the original IFB.^{1/}

Here, the contracting officer determined that each of the bids was unreasonable as to price. Specifically, the contracting officer, in rejecting all bids, relied on Federal Acquisition Regulation (FAR) § 14.404-1(c)(6) (FAC 84-5), which permits cancellation of an IFB where "all otherwise acceptable bids received are at unreasonable prices. . . ." The determination that prices are unreasonable is a matter of administrative discretion which we will not question unless it is clearly unreasonable or there is a showing of fraud or bad faith on the part of contracting officials. A.T.F. Construction Co., Inc., B-228060, et al., Oct. 30, 1987, 87-2 CPD ¶ 436. We have held that an unreasonable price determination may be based on a comparison of the bid price with the government estimate. Id.; Harrison Western Corp., B-225581, May 1, 1987, 87-1 CPD ¶ 457. The record shows that the low bid, submitted by Metric, was approximately 10 percent higher than the government estimate. We have found cancellation

^{1/} Concerning Metric's assertions that the agency report was untimely filed, we note that the agency report responding to the protests was timely filed within 25 working days of notification by our Office to the agency of the protest. 4 C.F.R. §§ 21.0(d) and 21.3(c) (1987).

based on price unreasonableness to be justified and not an abuse of discretion where the low responsive bid exceeded the government estimate by as little as 7.2 percent. See Building Maintenance Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233. Since the protesters have not alleged that the Navy acted fraudulently or in bad faith, we find the contracting officer here properly determined that the bidders' prices were unreasonable and that the cancellation was justified.

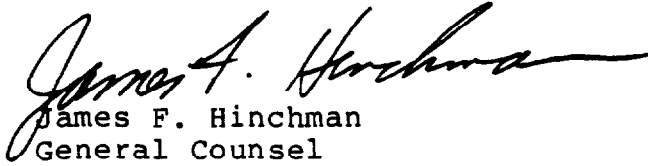
Moreover, the Navy also states that it did not have sufficient funds to award a contract to the low bidder and that this finding was an additional proper basis for canceling the solicitation. Our Office has consistently held that an agency's determination that funds are not available for contract obligation is a sufficient reason upon which to cancel a solicitation, even if the determination is not made until after bid opening, and that it is not for us to question the unavailability of funds. Grace Industries, Inc., B-228097.2, Mar. 1, 1988, 88-1 CPD ¶ 100; Military Base Management, Inc., B-216309, Dec. 4, 1984, 84-2 CPD ¶ 619.

Zachry also protests the contracting officer's determination to convert the sealed bid acquisition to a negotiated one. In accordance with FAR § 14.404-1(e), after the contracting officer determined that all bids submitted were unreasonably priced, all bids were rejected. The solicitation was then converted to a negotiated procurement, an approach permitted by FAR §§ 14.404-1(c)(6) and (e)(1) and 15.103 (FAC 84-5), which provide for completion of the acquisition through negotiation where all otherwise acceptable bids received are at unreasonable prices. Since all bids were reasonably determined to be excessive, we find the conversion proper.

Finally, Metric contends that the cancellation of the IFB and subsequent conversion to negotiation after disclosure of its bid price creates the potential for an auction. However, we have explicitly stated that where, as here, cancellation is in accord with governing legal requirements, the agency has not created an impermissible auction. See Emerson Electric Co., B-221827.2, June 4, 1986, 86-1 CPD ¶ 521. Moreover, we do not find that Metric has been prejudiced by the disclosure of its bid price. Although cancellation and conversion to negotiation may result in all other high bidders having another chance to compete with the knowledge of the prior bid prices, the competition the

second time also provides Metric another opportunity to offer whatever price it desires.

The protests are denied.


James F. Hinchman
General Counsel